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No. 91-344

In The

Supreme Court of the United States

October Term, 1991

BRIDGEPORT POLICE FOR EQUAL EMPLOYMENT OPPORTUNITY, INC., *et al.*,

Petitioners,

vs.

BRIDGEPORT GUARDIANS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Did the District Court and the Court of Appeals correctly rule that a municipal employer violated Title VII when it administered a promotional examination which had a disparate impact and then refused to use a method of selecting candidates from the promotional list which would alleviate the disparate impact at no significant cost to the employer and with no effect on the quality of candidates to be promoted?

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STATEMENT OF THE CASE

This lawsuit is yet another chapter in the nearly twenty year history of employment discrimination litigation involving the Bridgeport Police Department.[1] This history of litigation has involved virtually all aspects of police department operations from hiring to working conditions and promotions. Incredibly, to the present day, no minority police officer has ever advanced beyond the permanent rank of lieutenant. Because of the pervasiveness of racial discrimination, the department has remained under the scrutiny of a court-appointed Special Master for nearly a decade. *Bridgeport Guardians v. DelMonte*, 553 F. Supp. 601 (D. Conn. 1982).

This action arose as a result of the 1989 Bridgeport police sergeant's examination and as a result of the manner in which the municipal defendants intended to use the examination to make promotions. Contrary to the assertion of the petitioners in their petition for certiorari, the 1989 sergeant's examination was *not* developed "under court supervision" (Petition for Certiorari, p. 1). It was developed by the municipal defendants' testing consultant, Dr. James Outtz. The examination consisted of a written test which comprised fifty-three percent of a candidate's total score and an oral test which comprised forty-two percent of a candidate's total score (the remaining five percent of the score was based on departmental seniority).

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1. *See, for example, Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 354 F. Supp. 778 (D. Conn. 1973), *aff'd in part*, 482 F.2d 1333 (2d Cir. 1973); *Members of Bridgeport Housing Authority Police Force v. City of Bridgeport*, 499 F. Supp. 760 (D. Conn. 1980); *aff'd in part and rev'd in part*, 646 F.2d 55 (2d Cir. 1981); *Dobosz v. DelMonte*, 509 F. Supp. 964 (D. Conn. 1981); *Bridgeport Guardians v. Delmonte*, 553 F. Supp. 601 (D. Conn. 1982); *Brown v. Bridgeport Civil Service Commission*, B 86-282 (D. Conn. 1986).

Dr. Outtz did not intend that the examination be used to make promotions in strict rank order based on candidates' examination scores. Because of the inherent inability of any examination to precisely measure a candidate's ability to perform a particular job, Dr. Outtz recommended that statistically insignificant differences in test scores be ignored and that a selection method known as "banding" be employed. Simply stated, banding treats candidates whose scores do not differ by a statistically significant amount as equally qualified. Promotions among equally qualified candidates are then made based upon their professional qualifications.

It is undisputed that Dr. Outtz informed the municipal defendants that the examination "cannot be justified as valid for the specific use of strict rank ordering." In spite of this unequivocal statement from its own expert, the City insisted that the promotions be made in strict rank order. The reason for this insistence became obvious and was the motivation for this lawsuit.

The initial promotions planned to be made from the promotional list numbered nineteen; the first nineteen candidates on the list were White; the twentieth candidate was Black. Thus, the City's refusal to follow the instructions of its own testing consultant would have led to the promotion of nineteen Whites and no minorities. When the City announced that banding would not be used, the respondents initiated this action.

The City argued at trial that the nineteen promotions were merely the first round of promotions and that some other hypothetical number of promotions might be made from the list. This argument loses much if not all of its weight in light of recent events: the City has attempted to declare bankruptcy and, at the same time, the Mayor announced that up to one hundred police officers from a police force of approximately 350 officers could be laid off. Thus, these hypothetical numbers of promotions have

been shown to be of little value in assessing the disparate impact of the examination.

The respondents charged that the examination and its use resulted in a disparate impact on minority candidates. At trial, the respondents demonstrated the extent of the disparity. Unrefuted statistical evidence introduced by the respondents showed that minority candidates clustered at the bottom range of examination scores while White candidates clustered at the top range of scores. The respondents' expert, Dr. Alan Gelfand, the only trained statistician to testify at trial, explained that the clustering of White candidates among the top scores and minority candidates among the bottom scores was of extreme statistical significance. In fact, the probability that such a clustering could occur by chance was one in 10,000 for Black candidates and two in 10,000 for Hispanic candidates (probabilities of less than one in twenty are statistically significant).

The petitioners conspicuously fail to mention these one in 10,000 and two in 10,000 probabilities in their petition. They also mischaracterize the statistical test used by the respondents' expert, Dr. Gelfand. Contrary to the petitioners' assertion, the Mann-Whitney test used by Dr. Gelfand does not compare merely the average scores of all candidates. Rather, it compares the distribution and ranking of all scores to determine the probability that such a skewed clustering of scores could occur by chance. As the courts correctly found, the Mann-Whitney test was the most powerful and most appropriate measure of the disparate impact of the examination.

There is no question that the promotional examination disproportionately reduced (or eliminated) the opportunity of promotion for minority candidates. This reduction in opportunity was the focus of the case. However, the trial court also noted with disapproval, as did the Court of Appeals, two other facts.

First, in spite of the requirements of its own Affirmative Action Plan, the City assembled a panel of twenty-seven oral examiners which included not a single minority examiner. Second, in addition to rejecting Dr. Outtz's instructions to use banding, the City also rejected his recommendation of an alternative form of examination using video simulations which the City recognized as being "virtually race neutral," even though funds were available to pay for this examination.

After trial, the District Court ordered that the City use banding to select candidates for promotions and ordered the parties to submit proposals setting forth the manner in which banding should be carried out. In subsequent proceedings, the court specified the manner in which banding would be implemented, following in large measure the proposals submitted by the respondents and the City.

It is significant to note that the intervening defendants (an organization of White police officers) who initiated the petition for certiorari have not challenged the manner in which the banding procedure will be implemented. This is especially significant in light of their repeated invocation of the unsupportable allegation that banding is synonomous with quotas. It is simply a misstatement of fact to suggest that banding involves quotas. The District Court explicitly rejected the use of quotas. Further, the City of Bridgeport, which will be responsible for implementing banding, has decided not to appeal the decision of the Court of Appeals. Thus, the only issue on appeal is whether the City was justified in rejecting banding when it knew that the use of the examination in strict rank order was an invalid use of the examination and that the use of banding could alleviate the disparate impact of the examination without affecting the quality of candidates chosen for promotion.

REASONS FOR DENYING THE WRIT

There are two reasons why the petition for certiorari should be rejected. First, the Court of Appeals did not "misread" the decisions of this Court and absolutely did not approve the use of quotas, as the petitioners claim. Second, the facts of this case are unique to Bridgeport and to this examination and do not raise an issue which warrants review by this Court.

I.

The Court of Appeals correctly applied the law.

Contrary to the petitioners' assertion, there is no conflict between the decisions of this Court as applied by the Court of Appeals. The petitioners assert that the Court of Appeals "misread" *Connecticut v. Teal,* 457 U.S. 440 (1982) to create a conflict with *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989). This is simply incorrect.

The Court of Appeals cites *Connecticut v. Teal* only once, to stand for the unassailable proposition that the "underlying goal of Title VII is to ensure 'equality of *opportunity* and the elimination of discriminatory *barriers* to professional development.' " *Bridgeport Guardians v. City of Bridgeport,* 933 F.2d 1140, 1147 (2d Cir. 1991) (emphasis in original). The court continued, noting that "employers are not entitled to circumvent the statute's prohibition against use of racially discriminatory tests by merely showing that *eventually* they *may* hire some members of the disadvantaged minority group." *Id.* at 1147-48 (emphasis added).

The sole issue in this case involves promotional *opportunities.* The courts were confronted with an examination process which unfairly favored White candidates; examination results which left

minority candidates with minimal opportunity for promotion; and the City's rejection of an alternative selection method which was fair to everyone, which was recommended by the City's own testing consultant, and which provided equally qualified candidates for promotion. Not surprisingly, the trial and appellate courts reached the conclusion that the City should use the examination as it had been instructed to use it by the City's own testing consultant.

It is important to note that, as the District Court found, the use of banding does not guarantee promotions to minority candidates. Instead, it found merely that "Banding results in a more valid promotional procedure and *may* lead to the promotion of additional minorities." *Bridgeport Guardians v. City of Bridgeport,* 735 F. Supp. 1126, 1137 (D. Conn. 1990) (emphasis added).

This case fits precisely within the standards set forth by this Court in its decisions from *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) to *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989). In *Wards Cove,* this Court reiterated the following standard which it noted was first set forth in *Albemarle:*

> If respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

Wards Cove, id. at 660-661.

This is precisely what was proved in this case. After establishing a *prima facie* case, respondents came forward with

an alternative to the City's practice — banding instead of strict rank order promotions. Banding was shown to reduce the racially disparate impact of the examination yet the City refused to adopt banding. Further, the City's own testing consultant recommended banding because it would result in a more valid promotional process with no effect on the quality of candidates being promoted.

Petitioners simply stretch beyond reason when they attempt to manufacture a conflict between *Teal* and *Wards Cove*. For example, they illogically suggest that, because *Teal* involved a pass/fail test, it is not applicable to this case and that it conflicts with *Wards Cove*. However, the petitioners are then forced to admit that *Teal* and *Wards Cove* do not conflict if *Teal* is applied to cases in which "bottom line racial balance is raised in defense of specific discriminatory practices" (Petition at p. 5). This is precisely the manner in which the Court of Appeals applied both *Teal* and *Wards Cove* to reject the City's bottom line defense.

Further, as subsequent events have demonstrated, the City's bottom line defense was faulty. Based on a hypothetical number of promotions, the bottom line defense crumbles in light of the City's financial situation which may jeopardize its ability to promote even the first nineteen candidates on the list.

Finally, the petitioners make the incredible and incorrect assertion that the Court of Appeals "held that individuals could make a prima facie case without showing any disparate impact on the group to which they belong." (Petition, p. 6). Petitioners inexplicably ignore the facts: the unrefuted evidence was that the probability that the enormous disparity in scores of minority and White candidates occurred by chance was one or two in 10,000. The entire point of the trial was that minority candidates were disproportionately disadvantaged, as a group, by the test and its use in strict rank order. Both the District Court and the Court of Appeals found this to be the case.

II.

The facts do not create a significant issue.

The facts of this case do not warrant review of the issue presented by the petitioners. The petitioners state the issue to suggest that there is no disparate impact because the employer's decision, (*i.e.*, the promotions) did not produce a statistically significant disparate impact. As described above, the employer's hypothetical promotions have proven to be nothing more than hypothetical in light of the City's bankruptcy filing. The examination disproportionately reduced the promotional opportunities of minority candidates. Therefore, it had a disparate impact and the City's refusal to use banding to alleviate this disparate impact demonstrated the pretextual nature of its justifications for using the examination in strict rank order.

The question presented, as stated by the petitioners, misstates the facts so dramatically that it becomes an issue not raised by this case. Disparate impact was not measured using "mean exam scores." At the time the litigation was initiated, nineteen promotions were planned; by the time of trial, twenty-five were purportedly planned; at present, it is not possible to know whether any promotions will occur in light of the City's financial condition. The City used the examination in a manner which was invalid, refusing to follow the instructions of its own expert, which resulted in an enormous disparate impact on promotional opportunities. Finally, and most significantly, the City of Bridgeport has decided not to appeal the decision of the Court of Appeals. These facts hardly raise a question of such significance as to warrant review by this Court.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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